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ASSOCIATED PAN MALAYSIA CEMENT SDN BHD

v.

WESTWOOD DEVELOPMENT SDN BHD

B

HIGH COURT MALAYA, KUALA LUMPUR
VAZEER ALAM MYDIN MEERA JC
[SUIT NO: 22NCVC-352-03-2012]
31 MAY 2013

C

CIVIL PROCEDURE: *Res judicata - Estoppel - Findings of facts made in earlier suit - Defendant estopped from denying same facts arising in current proceedings*

EVIDENCE: *Documentary evidence - Admissibility - Marking as exhibit - Whether ID document forms part of evidence*

D

LAND LAW: *Alienation - Powers of State Authority to alienate land - Whether State Authority can alienate mining land - National Land Code, s. 5(d)*

LAND LAW: *Boundary - Determination of - Part of land under mining lease*

E

surrendered for squatter relocation - Land resurveyed and new southern boundary ascertained - Whether Mesyuarat Tindakan Ekonomi Negeri Selangor had authority to instruct re-survey - Whether State Authority can excise any portion of land held under mining lease without lessee's agreement

F

LAND LAW: *Indefeasibility of title and interest - Exceptions - Title or interest unlawfully acquired - Alienation of non State land - Titles issued in contravention of National Land Code - Issue of titles by registrar unlawful - Titles defeasible - National Land Code, s. 340(2)(c)*

G

LAND LAW: *Lease - Renewal - Lease of mining land - Application for renewal - Conditional approval - Whether lease validly renewed notwithstanding non issuance of fresh mining lease certificate - Mineral (Selangor) Enactment 2000, ss. 63, 66(9)*

H

The plaintiff was the lessee of a land for mining purposes under s. 63 of the Mineral (Selangor) Enactment 2000 ('MSE'). Since the plaintiff's lease was to expire on 31 December 2003, the plaintiff applied to the Pejabat Tanah dan Galian, Selangor ('PTG') for a renewal of the lease. By a letter dated 26 April 2004, the PTG conveyed a conditional approval ('the approval letter') for the renewal application by the Majlis Mesyuarat Kerajaan Negeri ('MMKN'). Sometime in 2004, the plaintiff

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surrendered a part of the land for the purpose of squatter relocation. The land was resurveyed and a new southern boundary was ascertained

in a survey plan ('2005 Survey Plan') which was approved by the Director of Survey and Mapping Selangor ("JUPEM"). In October 2010, the plaintiff discovered that the defendant was seeking to develop the land adjacent to the plaintiff's land and that the proposed development would encroach onto part of the plaintiff's land in the southern boundary ('the disputed area'). The plaintiff thus filed a civil suit against the defendant ('2011 suit') where the court declared that the new southern boundary of the plaintiff's land was as per the 2005 Survey Plan and that any development by the defendant that encroached into the disputed area would constitute an encroachment. Despite this, on 17 November 2011, JUPEM approved a new survey plan ('new survey plan') which showed the disputed area as being part of the defendant's development. The disputed area was then alienated by the State Authority with sub-divided titles in favour of the defendant. The plaintiff thus in the present suit contended the new survey plan, the pre-computation plan and the sub-divided titles were all null and void and that the titles were defeasible pursuant to s. 340(2)(b) and (c) of the National Land Code ('NLC'). The defendant claimed that: (i) the plaintiff was not a lessee of the land as the approval letter did not amount to a mining lease; and (ii) the Mesyuarat Tindakan Ekonomi Negeri Selangor ('MTES') had instructed for a re-survey to be done excluding the disputed area.

Held (allowing plaintiff's claim; dismissing defendant's counterclaim with cost):

(1) Due to the finding of facts in the 2011 Suit that the plaintiff was the lessee of the land with a valid lease, this was now *res judicata* and the defendant was estopped from denying that fact. (para 17)

(2) By operation of s. 66(9) of the MSE, the plaintiff had a valid and subsisting mining lease over the land even though a fresh mining lease certificate had not been issued. (para 18)

(3) The issue whether the 2005 Survey Plan was conclusive evidence of the boundaries, boundary marks and area of the land had been determined in the 2011 Suit. Therefore, the matter of the conclusiveness of the 2005 Survey Plan was *res judicata* and the doctrine of issue estoppel barred the defendant from raising it in subsequent proceedings. (paras 23 & 24)

(4) The plaintiff was not obliged to follow the decision of the MTES regarding the re-survey because: (i) the State Authority cannot excise any portion of land contained in a valid mining lease without the agreement of the lessee; (ii) the MTES did not have any authority to direct the plaintiff to carry out any re-survey of the

2005 Survey Plan; (iii) the issue of the boundary and the disputed area was pending resolution under the 2011 Suit at that time; (iv) none of the situations under which the Director of Survey and Mapping may amend an approved stratum plan under s. 396A of the NLC applied and thus the new survey plan could not supersede the 2005 Survey Plan. (paras 28, 29, 30 & 33)

(5) The new survey plan remained an ID document. Such documents did not form part of the evidence for the court's consideration and any evidence or testimony in regards to these document are to be disregarded. Therefore, the only approved survey plan before the court was the 2005 Survey Plan; *PP v. Datuk Haji Harun Haji Idris & Ors* (refd). (para 34)

(6) Under s. 5(d) of the NLC, mining land is not part of State land. The State Authority can only alienate State land. Hence, the State Authority did not have any authority or power to alienate the disputed area to the defendant. (para 36)

(7) The defendant's titles were defeasible by reason of the fact that the titles were issued in contravention of the stipulation of the NLC in that land that was not State land had been alienated to the defendant. The purported exercise of the powers by the Registrar in issuing the titles to the defendant was clearly unlawful and the titles were defeasible under s. 340(2)(c) of the NLC. (para 38)

Case(s) referred to:

Lebbey Sdn Bhd v. Chong Wooi Leong & Anor [1998] 1 CLJ 1072 HC ***(refd)***

PP v. Datuk Haji Harun Haji Idris & Ors [1977] 1 LNS 92 HC ***(refd)***

Saminathan v. Pappa [1980] 1 LNS 174 PC ***(refd)***

Shamsudin Che Mat & Ors v. Datuk Bandar Kuala Lumpur [2000] 1 LNS 185 HC ***(refd)***

Uptown Properties Sdn Bhd v. Pentadbir Tanah Wilayah Persekutuan & Ors [2012] 3 CLJ 271 HC ***(refd)***

Legislation referred to:

Federal Constitution, art. 13(1)

Mineral (Selangor) Enactment 2000, ss. 2, 63(12), 66(2), (9), 124

National Land Code, ss. 5, 340(2)(b), (c), 392(2), 396A, 396(2), 417

For the plaintiff - Leong Wai Hong (Aufa Radzi & Eyza Farizan Mokhtar with him); M/s Skrine

For the defendant - Gregory Ling (Kenneth Goh & Adeline Yew with him); M/s Ranjit Singh & Yeoh

Reported by Amutha Suppayah

JUDGMENT

Vazeer Alam Mydin Meera JC:

[1] The facts leading to the plaintiff's claim and the defendant's counterclaim is well set out in the submissions of counsel for the defendant and I have set them out below.

[2] The plaintiff has pleaded in the statement of claim ("SOC") the following:

(a) The plaintiff is and was at all times, a lessee of land held under Lot 20146, Bandar Rawang, Daerah Gombak, Selangor ("the mining land") for mining purposes under s. 63 of the Mineral (Selangor) Enactment 2000 ("MSE").

The said mining lease dated 1 January 1984 ("the mining lease") was for a period expiring on 31 December 2003.

(b) By a letter dated 16 August 2002, the plaintiff applied to the Pejabat Tanah dan Galian, Selangor ("PTG") for a renewal of the mining lease ("renewal application") and by a letter dated 26 April 2004, the PTG conveyed the conditional approval of the renewal application ("approval letter") by the Majlis Mesyuarat Kerajaan Negeri ("MMKN").

(c) Sometime in 2004, upon the request of the then Selangor state government, the plaintiff agreed to surrender a part of the mining land for the purpose of squatter relocation undertaken by the state government.

(d) The mining land was then surveyed on 24 January 2005 and a new southern boundary that was proposed by the plaintiff to the State Authority ("State Authority") back in 2004 was ascertained and confirmed in a survey plan bearing No. PA 103485 ("2005 Survey Plan"). On 28 June 2005, this 2005 Survey Plan was approved by the Director of Survey and Mapping Selangor ("JUPEM").

(e) Sometime in October 2010, the plaintiff discovered that the defendant was seeking to develop the land adjacent to the mining land and had submitted a housing development plan for approval by the authorities ("Defendants Development Plan").

(f) The defendant's development plan showed that the defendant's proposed development would encroach onto land, within the plaintiff's buffer zone, measuring approximately 4 acres at the southern boundary of the mining land ("the disputed area").

(g) Accordingly, on 31 January 2011, the plaintiff filed a civil suit against the defendant in the Kuala Lumpur High Court Suit No. S-22NCVC-96-2011 ("2011 Suit") to determine the boundary of the mining land and for a declaration that the defendant's proposed development encroached onto the mining land, namely the disputed area.

(h) On 25 February 2011, a consent injunction order was recorded between the parties before the Honourable Judicial Commissioner Lee Swee Seng providing for certain injunctive relief pending the trial of 2011 Suit.

(i) On 8 July 2011, at the trial of the 2011 Suit, the then High Court Judicial Commissioner The Honourable Amelia Tee Hong Geok bt Abdullah ("Justice Amelia Tee") granted the following orders in favour of the plaintiff ("8 July 2011 Order"):

(i) A declaration that the new southern boundary of the mining land was as per the 2005 Survey Plan; and

(ii) A declaration that any development by the defendant that encroaches into the southern boundary in the 2005 Survey Plan would constitute an encroachment into the boundary of the mining land.

(j) As the defendant did not appeal against, set aside or stay the 2011 Court Order, the plaintiff considers the 8 July 2011 Order as having validly and conclusively decided that the disputed area belongs to the plaintiff as part of the mining land.

(k) Therefore, the plaintiff avers that the issue as to whether the disputed area is part of the mining land belonging to the plaintiff is *res judicata* and the defendant is estopped from alleging it has any rights over the same.

(l) It is alleged by the plaintiff that the defendant breached 8 July 2011 order when the defendant, "behind the plaintiff's back", obtained ownership of land titles from the State Authority for land situated within the disputed area. The plaintiff states that:

(i) On 22 June 2011, the Selayang Municipal Council ("MPS") approved a "Pelan Pra-Hitungan" No: JB/2007/007/H/6 ("Pre-Computation Plan");

(ii) On 17 November 2011, JUPEM approved a new survey plan PA 203694 ("New Survey Plan") which stipulated that the disputed area is no longer part of the plaintiff's mining land but was now part of the defendant's development; and

(iii) The disputed area was alienated by the State Authority and sub-divided into more than 55 sub-divided land titles, in favour of the defendant ("land titles"). A

(m) The plaintiff contends the new survey plan, the pre-computation plan and the land titles are all null and void and that the land titles are defeasible pursuant to ss. 340(2)(b) and (c) of the NLC. In this regard, the plaintiff made the following allegations against the defendant: B

(i) that the defendant "misled" (JUPEM) to approve the new survey plan in the defendant's favour in blatant breach of the 8 July 2011 Order; and C

(ii) that the defendant had "acted in bad faith" as the pre-computation plan was approved on 22 June 2011 when the 2011 Suit was still ongoing. D

(n) By reason of the above, the plaintiff argues that it has suffered loss and damage and seeks the reliefs mentioned below.

[3] The plaintiff is seeking the following relief:

(a) A declaration that land titles held in the defendant's name as in appendix A to the statement of claim are part of the mining land belonging to the plaintiff pursuant to the mining lease. E

(b) A declaration that all individual land titles listed in the said appendix A are null and void. F

(c) A declaration that Survey Plan PA 103485 ("2005 Survey Plan") is valid, binding and sets out the correct boundary of the mining land.

(d) A declaration that the High Court Order dated 8 July 2001 ("8 July 2011 Order") reflects the correct boundary of the mining land. G

(e) An injunction to restrain the defendant from encroaching or proceeding with developing and carrying out any works on the encroached area ("disputed area") as shown in the land titles in appendix A; H

(f) An order under s. 417 of the National Land Code 1965 ("NLC") and pursuant to the court's inherent powers directing the Registrar or Land Administrator to rectify the register by cancelling the name of the defendant on the register documents of title for land held under the titles listed in the said appendix A; I

(g) General damages; and

(h) Cost.

[4] Pending trial, the plaintiff obtained the following interlocutory injunction orders:

(a) On 29 March 2012, the plaintiff obtained an *ex parte* injunction order, *inter alia* restraining the defendant from proceeding with the defendant's development on the disputed area pending the *inter partes* hearing; and

(b) On 10 April 2012, this court granted an *inter partes* injunction order pending trial.

[5] The defendant's defence is set out in its defence as follows:

(a) The defendant is currently the registered proprietor of the disputed area as it was alienated by the State Authority to the defendant in December 2011;

(b) The plaintiff, is not a lessee of the mining land as it does not currently possess a valid and registered mining lease. The approval letter did not amount to a mining lease and was merely a conditional approval for a mining lease ie, it is subject to certain conditions and payments of which the plaintiff has failed to fulfill;

(c) The proposal as to the new southern boundary (including the proposed buffer zone of a minimum distance of (i) 200m between the plaintiff's primary crusher and the nearest house and (ii) 14.5m between the plaintiff's secondary crusher and the nearest house ("Plaintiff's Suggested Buffer Zone") was never approved by the MMKN;

(d) Instead, a buffer zone of 100m was ultimately approved by MMKN in the pre-computation plan ("Approved Buffer Zone");

(e) The approval of the 2005 Survey Plan by JUPEM did not mean that the mining land belonged to the plaintiff. The 2005 Survey Plan dealt with "boundaries" and not "ownership" of the surveyed land and was in any event subject to a fresh mining lease to be eventually issued to the plaintiff;

(f) Further, the validity of the 2005 Survey Plan is in question as:

(i) On 2 March 2011, MMKN made the decision to take away the plaintiff's right over the disputed area;

(ii) On 9 March 2011, the MMKN made the decision that the PTG was to write to the plaintiff directing them to perform a new survey plan *via* a licensed land surveyor and in doing so, exclude the disputed area;

(iii) On 10 March 2011, the Mesyuarat Tindakan Ekonomi Negeri Selangor ("MTES") of the State Government, also made the decision that PTG write to the plaintiff directing them to perform a new survey plan *via* a licensed land surveyor and in doing so, exclude the disputed area;

(iv) Accordingly, by a letter dated 11 March 2011, PTG wrote to the plaintiff informing them of the MTES decision and directing them to engage a licensed land surveyor to perform a re-measurement of the mining land and exclude the disputed area from the new survey, within two weeks from receipt of the letter ("11 March 2011 PTG Letter"); and

(v) The above directive from PTG would mean that the 2005 Survey Plan would eventually be amended and replaced by a new survey plan pursuant to s. 396A NLC;

(g) Meanwhile, the defendant had submitted to carry out the defendant's development as far back as 2007. The defendant's development is actually a project to re-settle squatters of Kampung Rawang Tin and was eventually approved by MMKN on 22 July 2009 ("Re-Settlement Project");

(h) The 8 July 2011 Order, ie, the decision after trial in the 2011 Suit did not conclusively decide as to the ownership of the disputed areas;

(i) In addition, the plaintiff failed to disclose to Justice Amelia Tee that (1) they had not been issued a mining lease certificate and (2) had received the letter dated 11 March 2011 from PTG directing them to perform a new survey plan to exclude the disputed area. Accordingly, 8 July 2011 Order is not binding upon the defendant and the defendant is not estopped from claiming that the disputed area belongs to the defendant; and

(j) The new survey plan, the pre-computation plan and the land titles were all properly approved by MMKN and the relevant authorities and are therefore valid and binding against the plaintiff.

[6] In turn, the defendant filed a counterclaim against the plaintiff in the following terms:

(a) The plaintiff committed fraud in withholding material facts and/or suppressing the 11 March 2001 PTG Letter, thereby misleading the court in the 2011 Suit into accepting the 2005 Survey Plan as valid and binding. The particulars are, *inter alia*, that:

(i) the plaintiff had fulfilled all the conditions and payments imposed upon them for the mining lease;

(ii) the 2005 Survey Plan was conclusive evidence of the boundaries of the mining land when the mining lease certificate itself had yet to be issued; and

(iii) the 2005 Survey Plan was valid and binding. In this regard, the plaintiff failed to disclose that they had received the 11 March 2011 PTG Letter and that till today the plaintiff has yet to comply with PTG's direction to prepare the new survey plan;

(b) The defendant did not raise this during the 2011 Suit as they were not aware of its existence;

(c) Further and/or in the alternative, there were subsequent changes in the circumstances that led to fresh material evidence that could not be adduced during the 2011 Suit through reasonable diligence;

(i) Prior to December 2011, the disputed area was State Land within the purview of the State Authority;

(ii) On 19 October 2011, the pre-computation plan was approved by MMKN confirming that the State Authority had agreed that the disputed area form part of the re-settlement project;

(iii) On 17 November 2011, the new survey plan was approved by JUPEM confirming that the disputed area was now part of the re-settlement project; and

(iv) in December 2011, State Land, including the disputed area, was alienated by the State Authority to the defendant for the re-settlement project.

(d) Consequent to the above, the 8 July 2011 Order is null and void and open to be impeached and set aside by court;

(e) The plaintiff has continued to interfere with the defendant's development including but not limited to restraining the defendant's development pending the conclusion of this trial. Notwithstanding

that, the defendant has already entered into approximately 136 sale and purchase agreements ("SPAs") (124 with the squatters and 12 with the general public) to build and deliver units within 24 months from the date of the SPAs; and

(f) The defendant therefore seeks to be indemnified for all the losses, claims, expenses and/or costs that may arise out of the delay/failure to complete the pre-settlement project.

[7] Therefore, the defendant is seeking the following relief:

(a) A declaration that the 2011 Court Order is null and void and of no effect and that the 2011 Court Order be set aside;

(b) A declaration that the 2005 Survey Plan is null and void and not binding upon the defendant.

(c) A declaration that the new survey plan is valid and binding upon the plaintiff and sets out the boundaries, boundary marks and area of lands designated for the re-settlement project;

(d) An order that the plaintiff appoints a licensed land surveyor to re-measure the area for the plaintiff's mining lease/mining land and to exclude the disputed area to conform with the new survey plan and to amend the 2005 Survey Plan to reflect the changes, within 14 days from the date of the order failing which the defendant shall appoint a licensed land surveyor to perform the same;

(e) Damages to be assessed by the Senior Assistant Registrar whereupon the assessed damages are to be paid by the plaintiff to the defendant;

(f) Interest on the assessed damages at a rate and period to be determined by the court; and

(g) Costs.

[8] There are several core issues for determination by this court and I will take them one by one.

Issue No. 1

Does The Plaintiff Have A Valid Mining Lease?

[9] The Mineral (Selangor) Enactment 2000 ("MSE") regulates the issuance of mining leases in the state of Selangor. Section 2 of the MSE defines mining lease and mining land as follows:

A "mining lease" means a mining lease granted under section 63 and a mining lease granted or issued under any previous written law relating to mining; and

"mining land" means any land in respect of which a mining lease or proprietary mining licence is for the time being in force.

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[10] It is common ground that the State Authority had issued the plaintiff a mining lease dated 1 January 1984 ("the old mining lease") for a period expiring on 31 December 2003. Section 124 of the MSE provides that:

C Every mining lease or mining certificate subsisting at the commencement of this Enactment shall continue to be in force under the Mining Enactment Selangor under which it was issued until the expiration thereof.

[11] Therefore, the plaintiff had a valid mining lease expiring on
D 31 December 2003. A mining lease may be renewed under s. 66(2) of the MSE and once the application for renewal is made at least 12 months prior to the expiry of the mining lease, s. 66(9) MSE provides that the term of the lease shall continue in force in respect of the land to which the application relates until the application is
E determined.

[12] Again there is uncontroverted evidence that the plaintiff had applied for the renewal of the mining lease 12 months before expiry and the Majlis Mesyuarat Kerajaan Negeri Selangor (MMKN) had on
F 13 August 2003 approved the plaintiff's application for a renewed period of 21 years, subject to conditions. This is reflected in the approval letter.

[13] The plaintiff had appealed against some of the conditions and complied with others. In fact it is the evidence of the plaintiff that the
G State Authority had agreed to amend or waive some of the conditions. Therefore, the renewal of the mining lease was an on going process. As a result of this, the final determination of the renewal which is the issuance of the new mining lease certificate had not been made.

[14] The counsel for the defendant argues that the application for
H renewal had been determined when the approval by the MMKN was given on 13 August 2003 and the same was conveyed to the plaintiff *via* the PTG Selangor letter dated 26 April 2004. I am, with respect, unable to agree with that proposition. The approval was a conditional one and the plaintiff was not agreeable to some of the conditions and
I had filed an appeal against those conditions. The State Authority was

considering the appeal. In the circumstance, it cannot be gain said that the renewal application had been determined with finality. Final determination of the application for renewal will come about when either there is rejection of the application (and any appeal of that rejection is also rejected) or approval leading to the issuance of a new mining lease certificate is completed. Here, there was conditional approval and the final determination of that process leading to the issuance of the mining lease certificate was in progress.

[15] Therefore, it is my finding that pursuant to the provisions of s. 66(9) of the MSE, the term of the old mining lease shall continue in force until the renewal application is determined with finality and a fresh mining lease certificate is issued by the relevant authority.

[16] The defendant's counsel also submits that there has not been timely compliance by the plaintiff of the conditions for renewal imposed by the State Authority and therefore the plaintiff cannot be said to have complied with the conditions for renewal. Though they may have been some instances of delay on the part of the plaintiff; I find that the delay does not in any way vitiate the lease renewal approval. The State Authority and the PTG have until the date of trial dealt with the plaintiff as if the lease renewal approval was valid and in force. The conduct of the PTG was such that the plaintiff was always regarded as a lessee in continuance of the old mining lease. In any event, whether or not the plaintiff is entitled to be issued with a new mining lease certificate is not an issue between the plaintiff and the defendant.

[17] In any event in the earlier 2011 suit, Justice Amelia Tee had made a finding at para. 32 of the grounds of judgment that:

> It is not in dispute that the plaintiff was a lessee of the Quarry Land located at ML 6 Lot 4222 Bandar Rawang, Daerah Gombak, Selangor for mining purposes under section 63 of the Mineral Enactment (Selangor) 2000. It is also not in dispute that the Majlis Mesyuarat Kerajaan Negeri Selangor had on 13.8.2003 approved the plaintiff's application for a mining lease for a period of 21 years, subject to conditions. This is reflected in the PTG Selangor letter dated 26.4.2004.

The reference to ML 6 Lot 4222 Bandar Rawang, Daerah Gombak, Selangor, in that grounds of judgment was in fact a reference to the old lot number of the mining land.

The defendant did not challenge this finding by filing an appeal. In this regard, that finding of fact, that the plaintiff was the lessee of the mining land with a valid lease, is now *res judicata* and the defendant would be estopped from denying that fact. As explained by PW2 Mr Yap Sze Pin,

A once the mining lease is renewed, and a fresh mining lease ("fresh mining lease") is issued, the plaintiff would get a title in continuation in respect of the mining land. I agree that is the law.

[18] Therefore, I find that by virtue of the mining lease, the application for renewal of the mining lease, the conditional approval granted by B MMKN, and by operation of s. 66(9) of the MSE, the plaintiff has a valid and subsisting mining lease over the mining land even though a fresh mining lease certificate has not been issued.

[19] In any event s. 63(12) of the MSE states that if the application C for mining lease is granted, the director shall, as soon as practicable after being notified by the State Authority, upon the payment of the prescribed fee; payment of the first year's rent; payment of survey fee and survey carried out by the Survey Officer, and payment of the fee for the mining lease plan, issue a mining lease under Form F as set D out in Schedule 1 of the MSE. In fact, PW1 had testified that all requirements under s. 63(12) MSE had been complied with by the plaintiff and all that remained was the issuance of the certificate. Further, PW2 in his testimony had said that it is not uncommon for the Certificate of Mining Lease to be issued years after compliance of the E requirements of the law and the conditions imposed by the State Authority.

Issue No 2

Whether The Plaintiff's 2005 Survey Plan Is Conclusive Evidence Of The F *Boundaries, Boundary Marks And Area Of The Mining Land*

[20] PW2 Mr Yap Sze Pin, a qualified licensed surveyor since 1972 and who had once held the position of Deputy Director of Survey and Mapping for Kedah and Perlis from 1973 to 1975, testified that the 2005 Survey is in fact the final cadastral survey plan bearing plan No. PA G 103485 which was approved by the Director of Survey and Mapping on 28 June 2005. PW2 explained that the effect of a final cadastral survey plan which has been approved by the Director of Survey and Mapping is that it is conclusive evidence of the boundaries, boundary marks and area of the land to which it refers, and of the area and the H lot number thereof. PW2 relies upon the provisions of s. 396(2) of the National Land Code ("NLC")to arrive at that conclusion. Now s. 396(2) NLC reads as follows:

> Any plan approved by the Director of Survey and Mapping under paragraph (e) of sub-section (1) shall be filed in his office, and I (without prejudice to the operation of section 49 in the case of land subsequently affected by any advance of the shore-line or of the bed

> of any river) shall be conclusive evidence of the boundaries, boundary marks of the land to which it refers and of the area and the lot number thereof.

[21] The final cadastral plan enables the Registrar to determine the boundary and location of the land comprised in the title prior to issuing the document of title or in this case the Mining Lease Certificate. That is the reason why the plaintiff was asked to carry out the survey of the mining land in 2005, as part of the conditions for the approval letter. In short, it is a pre-requisite for the issuance of the Mining Lease Certificate.

[22] The defendant contends that s. 392(2) NLC is only applicable to the states of Penang and Malacca and to the state of Selangor. I am unable to accept that contention as the notes to s. 396(2) of the stipulates that:

> This subsection, in its application to the states of Penang and Malacca shall be modified by deleting the words 'conclusive evidence' and the following words and substituting therefore the words "**conclusive evidence of the boundaries, boundary marks and area of the land to which it refers and *prima facie* evidence of the lot number there of**".

The words in bold were a modification of s. 396(2) as it applied to the States of Penang and Malacca, as modified by the National Land Code (Penang and Malacca) Order 1968 (PU 500/68). Therefore, it is not that the entire s. 396(2) NLC is not applicable to states other than Penang and Malacca but only that in respect of its application to Penang and Malacca it will be in its modified form.

[23] In any event, the issue whether the 2005 Survey Plan is conclusive evidence of the boundaries, boundary marks and area of the mining land has been determined by Justice Amelia Tee in the 2011 Suit and can be seen at para. 46 of the grounds of judgment that reads:

> No evidence has been adduced by the defendant to show that the plan CB 1 page 3 had ever been amended by the Director of Survey and Mapping under section 396A of the National Code Code 1965. In the absence of any such evidence the Court finds the survey plan as in CB1 page 3 would be the authoritative and conclusive survey plan which sets out the boundaries of the plaintiff's Quarry land.

[24] Therefore, I find that the matter of the conclusiveness of the 2005 Survey Plan is *res judicata* and the doctrine of estoppel would bar the defendant from raising it in subsequent proceedings.

A **Issue No 3**

Does The Defendant's New Survey Plan PA 203694 Supersede The Plaintiff's 2005 Survey Plan

[25] The defendant submits if the plaintiff had followed the directive of
B the PTG contained in the PTG's letter dated 11 March 2011 and carried out a re-survey then the 2005 Survey Plan would have been amended to exclude the disputed area and there would be no overlap.

[26] In that PTG's letter dated 11 March 2011 (exh. D15 at p. 46
C Bundle E) the plaintiff was informed that the Mesyuarat Majlis Tindakan Ekonomi Negeri Selangor (MTES) held on 10 March 2011 had decided that the plaintiff was to carry out a re-survey of the mining land and to exclude the disputed area from the area of the mining land. The plaintiff was requested to give its response to this request within two weeks
D from receipt of that letter.

[27] The plaintiff replied to the PTG by way of letter dated 24 March 2011 (pp. 491-492 Bundle B) asking that the decision of MTES be kept in abeyance. Further, the plaintiff informed the PTG that the matter was pending resolution in the court (the 2011 Suit) and requested that the
E court rule it on. The relevant part of that letter reads:

> Tambahan lagi, isu pertindihan tanah pajakan lombong APMC dengan kawasan yang telah diluluskan untuk pembangunan yang dicadangkan oleh Westwood Development Sdn Bhd telah diarahkan oleh Mahkamah Tinggi Kuala Lumpur untuk dibicarakan dengan sepenuhnya. Oleh
F yang demikian, status perkara ini perlulah dikekalkan sehingga isu-isu di dalam kes ini habis dipertimbangkan oleh pihak Mahkamah Tinggi.

[28] I find that, contrary to the defendant's assertion, the plaintiff is not obliged to follow the decision of the MTES for several reasons. Firstly, the plaintiff had a valid mining lease and the mining land was
G comprised in the mining lease. The mining land is not state land. The State Authority cannot excise any portion of land contained in a valid mining lease without the agreement of the lessee. This was in fact the evidence of PW2. Secondly, no evidence was led in respect of this entity called the MTES - under what authority was it formed, where do they
H derive their powers from, etc. Under the NLC the power to issue or renew a mining lease is vested with the State Authority. In *Lebbey Sdn Bhd v. Chong Wooi Leong & Anor* [1998] 1 CLJ 1072 Abdul Wahab J held that:

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> State authority under the Code is defined, for the purposes of the State of Selangor, as the Ruler. For practical purposes, this means the Ruler acting upon the recommendation of the Exco of the state.

That is the generally regarded proposition of law in so far as the exercise of state executive authority is concerned and it has found further judicial support by Faiza Thamby Chik J in *Shamsudin Che Mat & Ors v. Datuk Bandar Kuala Lumpur* [2000] 1 LNS 185; [2000] 4 MLJ 177 where he held:

> And the Ruler, by virtue of cl. 55 of the Selangor State Constitution, must act on the advice of the State Executive Council except for certain functions which he may act in his discretion. By cl. 50 of that State Constitution, the executive authority of the State shall be vested in the Ruler but executive functions may by law be conferred on other persons or authorities. A licence or consent from any other person, therefore, as in this case, be it the local government official, land administrator, district officer, minister, member of parliament, state assemblyman or anyone else in a position of authority certainly would not suffice.

[29] The defendant has failed to adduce any evidence that the executive authority or power of the State Authority under the NLC had been conferred onto the MTES pursuant to cl. 50 of the Selangor State Constitution. In the absence of that evidence, I find that the MTES does not have any authority to direct the plaintiff to carry out any re-survey of the 2005 Survey Plan.

[30] Thirdly, the issue of the boundary and the disputed area was pending resolution under the 2011 Suit and as properly point out by the plaintiff to the PTG, it was better to preserve *status quo* and have the matter determined by the court. In fact the MMKN at its meeting held on 9 March 2011 and as shown in the minutes of meeting (at pp. 43-45 of Bundle E) had decided to suspend the defendant's development pending the judgment of the court in the 2011 Suit.

[31] That view also finds support in the letter dated 24 February 2011 issued by the State Legal Advisor to YB Gan Pei Nei, Ahli Dewan Undangan Negeri Rawang (at pp. 55-60 of Bundle E) where the State Legal Advisor had also recommended that any decisions made by the State Authority should not affect or interfere with court proceedings in the 2011 Suit. In fact DW2 in cross-examination had agreed that the position of the State Authority at the material time was to let the court decide on the issue. Therefore, it is strange that the re-survey was directed to be done MTES.

[32] Fourthly, any amendment to the 2005 Survey Plan can only be done in situations provided for in s. 396A of the NLC which provides that:

> (1) The Director of Survey and Mapping shall amend the stratum plan approved by him under paragraph (e) of sub-section (1) of section 396 if:

A (a) he is satisfied that such stratum plan contains an error or omission, or

(b) any alienated land becomes included within the boundaries of a new district, new sub-district, new mukim, new town or new village as a result of notification in the Gazette under
B section 11 or by virtue of such powers under any previous land law, or

(c) any alienated land has ceased to be part of any town, village or mukim.

C **[33]** I find that none of the situations under which the Director of Survey and Mapping may amend an approved stratum plan under s. 396A of the NLC applies to the present case. Neither has the plaintiff consented to surrender the disputed land that is contained in the mining lease to the state. Therefore, I find that the defendant's new survey plan PA 203694 cannot supersede the plaintiff's 2005 Survey Plan.
D

[34] In any event, the defendant's survey plan remained an ID document, being marked as "IDD-14". An ID document is not a document that has been properly admitted as evidence at trial. It is trite that such documents do not form part of the evidence for the court's
E consideration and any evidence or testimony in regards to these document are to be disregarded. (See *PP v. Datuk Haji Harun Haji Idris & Ors* [1977] 1 LNS 92; [1977] 1 MLJ 180). Therefore, the only approved survey plan before this court is the 2005 Survey Plan of the plaintiff.

F **Issue No. 4**

Can Part Of The Mining Land Be Alienated By The State To The Defendant?

G **[35]** A good starting point to answer this question would be the definition of 'state land' in s. 5 of the NLC which reads:

"State land" means all land in the State (including so much of the bed of any river, and of the foreshore and bed of the sea, as is within the territories of the State or the limits of territorial waters) other than:

H (a) alienated land;

(b) reserved land;

(c) mining land;

I (d) any land which, under the provisions of any law relating to forests (whether passed before or after the commencement of this Act) is for the time being reserved forest.

[36] Therefore, clearly under sub-s. (d) mining land is not part of state land. The State Authority can only alienate state land, as "alienate" under s. 5 NLC means:

> to dispose of State land in perpetuity or for a term of years, in consideration of the payment of rent, and otherwise in accordance with the provisions of section 76 or, when used in relation to the period before the commencement of this Act, to dispose of State land in perpetuity or for a term of years under a previous land law (not being a law relating to mining).

The disputed area for reasons discussed earlier is mining land as defined in the s. 5 of the NLC. Therefore, I find that the State Authority does not have any authority or power to alienate the disputed area to the defendant.

Issue No. 5

Are The Defendant's Titles For The Disputed Area Indefeasible?

[37] The plaintiff submits that the defendant's titles are not indefeasible on the grounds that they were obtained through insufficient or void instrument, ie, the invalid new survey plans and/or that they are unlawful under s. 340(2)(b) and (c) of NLC.

[38] I agree that the titles are defeasible by reason of the fact that the titles were issued in contravention of the stipulation of the National Land Code in that land that is not state land had been alienated to the defendant. The purported exercise of the powers by the Registrar in issuing the titles to the defendant is clearly unlawful and the titles are defeasible under s. 340(2)(c) of the NLC which provides that:

> The title or interest of any such person or body shall not be indefeasible:
>
> (a) …
>
> (b) …
>
> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

[39] The act of the Registrar in issuing the titles to the defendant in respect of the disputed area has been done arbitrarily without due regard to the interest of the plaintiff. The plaintiff's rights over the disputed area, which I find is part of the mining land, has been trampled and violated by the issuance of these titles to the defendant. In fact

art. 13(1) of the Federal Constitution provides that a person shall not be deprived of property save in accordance with law. I find that by the issuance of the titles to the disputed area to the defendant, the State Authority has breached the constitutional right of the plaintiff to ownership of its property for the plaintiff has been deprived of its property not in accordance with law. (See the case of *Uptown Properties Sdn Bhd v. Pentadbir Tanah Wilayah Persekutuan & Ors* [2012] 3 CLJ 271; [2012] MLJU 131).

Issue No 6

The Defendant's Counterclaim

[40] The defendant alleges that the plaintiff had suppressed material facts from the 2011 Suit and had committed fraud in not producing the letter dated 11 March 2011 from the PTG. The plaintiff denies this allegation.

[41] I find that there has been no suppression of material facts by the plaintiff in the 2011 Suit. DW2 agreed in his testimony that he was present during the MTES meeting which decided that a fresh survey was to be conducted. Since that matter was known to the defendant's (through DW2), I agree with the plaintiff's counsel that the defendant could have raised this issue at the trial of the 2011 Suit. The defendant chose not to and it is now too late to accuse the plaintiff of deliberate suppression of material facts. In any event, for reasons discussed earlier, I do not find the MTES decision to be material or relevant to the 2011 Suit.

[42] Further, I do not find the non-production of the 11 March 2011 letter from the PTG amount to an act of fraud. In *Saminathan v. Pappa* [1980] 1 LNS 174; [1981] 1 MLJ 121 the Federal Court's ruling that in fraud cases, the burden of proof must be proved beyond reasonable doubt was upheld by the Privy Council. The defendant bears that heavy burden and I find that it has failed to discharge that burden. Again, I reiterate that the MTES decision conveyed to the plaintiff in that PTG's letter was known to the defendant, though the letter itself may not be within the defendant's knowledge then. I fail to see how a matter that is already known to the defendant, and where the defendant's officer were present when that decision was made, can amount to fraud by the plaintiff merely because the plaintiff chose not to adduce that fact as evidence in the 2011 Suit. If the defendant thought that it was a material and relevant fact for the court to consider then the defendant could and should have adduced it in evidence.

[43] In the premise of the foregoing, I find that the plaintiff has proved its case and the defendant has failed to prove its counterclaim. Therefore, I allowed the plaintiff's claim and dismissed the defendant's counterclaim with cost. Accordingly judgment was entered for the plaintiff and the following orders were made:

(a) a declaration that all the land titles held in the name of the defendant under the titles listed in appendix A to the statement of claim are part of the land granted to the plaintiff by the Pejabat Tanah dan Galian, Selangor Darul Ehsan under a mining lease for 21 years approved *vide* letter dated 26 April 2004;

(b) a declaration that all the individual land titles listed in the said appendix A are null and void;

(c) a declaration that Survey Plan No. PA 103485 is valid, binding and sets out the correct boundary of the land granted to the plaintiff by the Pejabat Tanah dan Galian, Selangor Darul Ehsan under a mining lease for 21 years *vide* approval letter dated 26 April 2004;

(d) a declaration that the High Court Order dated 8 July 2011 reflects the correct boundary of the land granted to the plaintiff by the Pejabat Tanah dan Galian, Selangor Darul Ehsan under a mining lease for 21 years *vide* approval letter dated 26 April 2004;

(e) an injunction to restrain the defendant whether by itself, its directors, officers, employees, servants or agents or any business or company controlled by it as the case may be or any of them or otherwise howsoever from encroaching or proceeding with developing and carrying out any works whatsoever on the encroached area as shown in the titles for the land held under the titles listed in the said appendix A;

(f) an order under 417 of the National Land Code 1965 and pursuant to the court's inherent powers directing the Registrar or Land Administrator to rectify the register by cancelling the name of the defendant on the register documents of title for the land held under the titles listed in the said appendix A;

(g) that general damages be assessed; and

(h) cost of RM90,000 globally for the trial and all interlocutory applications be paid by the defendant to the plaintiff.